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In the Supreme Court of the United States

OCTOBER TERM, 1984

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

BERNARDO RIOS-PINEDA

AND

ESTARNILADA RIOS-PINEDA DE RIOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Attorney General and his delegates have discretion to deny an alien's motion to reopen deportation proceedings for the purpose of seeking suspension of deportation under 8 U.S.C. 1254(a)(1) because the alien has acquired the necessary seven years' "continuous physical presence" only by filing frivolous appeals and has in other ways exhibited disregard for the immigration laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 720 F.2d 529. The initial opinion of the court of appeals (Pet. App. 16a-20a) is reported at 673 F.2d 225. The opinions of the Board of Immigration Appeals (Pet. App. 11a-15a, 21a-24a) are not reported. The decision of the immigration judge (Pet. App. 25a-30a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on November 9, 1983. A petition for rehearing was denied on January 13, 1984 (Pet. App. 32a). On April 4, 1984, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 11, 1984. The petition was filed on that date and was granted on December 3, 1984 (J.A. 41). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

8 U.S.C. 1254(a) provides in pertinent part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien * * * who applies to the Attorney General for suspension of the deportation and—
>
> (1) is deportable under any law of the United States * * *; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

8 C.F.R. 3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

STATEMENT

1. Respondents, who are husband and wife, are natives and citizens of Mexico. Bernardo Rios-Pineda unlawfully entered the United States in the summer of 1972 (Pet. App. 17a). In early 1974, he returned to Mexico under threat of deportation (*id.* at 12a, 17a, 27a). Two months later, on May 1, 1974, both respondents entered the United States without inspection, in violation of 8 U.S.C. 1251(a)(2) (Pet. App. 2a, 12a, 17a, 25a-26a). Respondents effected this entry with the assistance of an alien smuggler, whom they paid about $450 for his services (*id.* at 27a-28a).

Subsequently, Mr. Rios-Pineda was apprehended by officers of the Immigration and Naturalization Service (INS) and was granted permission to return voluntarily to Mexico in lieu of deportation (Pet. App. 28a). Although given at least two extensions of time to depart, Mr. Rios-Pineda did not do so (*ibid.*). The INS thereupon instituted deportation proceedings against both respondents in October 1978 by issuing orders to show cause, which alleged that respondents entered the country without inspection near San Ysidro, California, on or about May 1, 1974 (*id.* at 25a-26a; J.A. 39-40).

At the deportation hearing in December 1978, respondents, through counsel, admitted the allegations

contained in the orders to show cause and conceded deportability (Pet. App. 22a, 25a-26a; R. 85-86).[1] In response to the immigration judge's suggestion that they apply for voluntary departure in lieu of deportation, respondents, through counsel, orally requested relief from deportation, alleging that they had one citizen child and were expecting a second child, that Mr. Rios-Pineda was employed, and that an application for labor certification (see 8 U.S.C. 1101(a)(15)(H); 8 C.F.R. 214.2(h)(3)(i)) had been filed on his behalf (Pet. App. 26a-27a; J.A. 38). Respondents' counsel also suggested that Mr. Rios-Pineda had seven years' continuous presence in the United States (J.A. 38) and should therefore be considered for suspension of deportation under 8 U.S.C. 1254(a)(1), but inquiries by the immigration judge at the hearing clearly established that the seven-year requirement had not been satisfied (R. 89-94).

The immigration judge ordered respondents deported to Mexico (Pet. App. 25a-30a). He ruled that Mr. Rios-Pineda was ineligible for suspension of deportation because he had not attained the required seven years' "continuous physical presence" (*id.* at 27a, 29a). The judge noted that Mr. Rios-Pineda had initially entered the United States in the summer of 1972 and thus could not possibly have been present in the United States for seven continuous years at the time of the December 1978 deportation hearing. Moreover, the judge ruled that Mr. Rios-Pineda's 1974 departure and two-month absence under threat of deportation constituted a break in the period of

[1] "R." refers to the certified administrative record.

"continuous physical presence."[2] The immigration judge also denied respondents' application for voluntary departure pursuant to 8 U.S.C. 1254(e), noting, inter alia, that respondents had used a professional smuggler to enter this country, that Mr. Rios-Pineda had failed to depart voluntarily when given the opportunity to do so prior to institution of deportation proceedings, and that he had reentered this country only two months after his departure under the threat of deportation in 1974 (Pet. App. 29a-30a).

Respondents appealed their deportation order to the Board of Immigration Appeals (BIA), thus staying their deportation (8 C.F.R. 3.6(a)). Respondents did not challenge the denial of their request for suspension of deportation (J.A. 34-37). Rather, they claimed that deportation would violate the constitutional rights of their citizen child, that Mr. Rios-Pineda was eligible for relief under 8 U.S.C. 1182(c), that the order to show cause should never have been issued because Mr. Rios-Pineda's employer had applied for labor certification on his behalf, and that the immigration judge's questioning at the deportation hearing had violated respondents' Fifth Amendment privilege against self-incrimination. The BIA rejected each of respondents' claims and dismissed the appeal (Pet. App. 21a-24a).[3]

[2] Because Mrs. Rios-Pineda had first entered the United States in May 1974 when her husband reentered, she plainly did not meet the continuous presence requirement, and the judge did not specifically address the issue with respect to her.

[3] Respondents' brief to the BIA consisted almost entirely of conclusory allegations (J.A. 36-37). The BIA explained that the courts had uniformly held that the deportation of alien parents, even if it results in the de facto deportation of

2. In July 1980, respondents filed a petition for review in the court of appeals (J.A. 31-33), which automatically stayed their deportation pursuant to 8 U.S.C. 1105a(a)(3). Respondents contended in their brief that their constitutional rights had been violated because the immigration judge did not give them *Miranda* warnings before questioning them at the deportation hearing, that their deportation would constitute an unlawful de facto deportation of their two citizen children, and that the immigration judge erred in concluding that Mr. Rios-Pineda had not been physically present in the United States for a continuous period of seven years. Respondents urged

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citizen children, does not violate the children's constitutional rights (Pet. App. 22a-23a, citing, *e.g.*, *Rubio de Cachu* v. *INS*, 568 F.2d 625 (9th Cir. 1977); *Acosta* v. *Gaffney*, 558 F.2d 1153 (3d Cir. 1977); *Faustino* v. *INS*, 432 F.2d 429 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971)). The BIA found respondents ineligible for relief under 8 U.S.C. 1182(c), which permits relief from exclusion or deportation for aliens "lawfully admitted for permanent residence," because respondents had entered the country without inspection and plainly had never been admitted as lawful permanent residents (Pet. App. 23a). In addition, the BIA rejected respondents' contention that their privilege against self-incrimination was violated at the deportation hearing. Respondents were represented by counsel at the hearing, they did not object to any of the questions posed at the hearing, and they submitted no evidence that their testimony had been compelled (*id.* at 24a). Indeed, the BIA observed that counsel had freely conceded respondents' deportability and had waived the reading of their rights pursuant to 8 C.F.R. 242.16. Pet. App. 24a. Finally, the BIA held that the commencement of deportation proceedings against a deportable alien is a matter within the discretion of the District Director and was not invalid simply because Mr. Rios-Pineda had an application for labor certification pending.

the court to "order that [their] deportation * * * be suspended" (J.A. 29).

In March 1982, 15 months after the briefs were filed, the court of appeals reversed the decision of the Board and remanded the case for further proceedings (Pet. App. 16a-20a). In so doing, the court did not address the merits of any of respondents' claims of error. Instead, the court found that respondents had accrued the requisite seven years' "continuous physical presence" while their petition for review was pending, and it concluded that respondents had " 'made a substantial showing that the Board should properly afford [them] relief on the basis of the additional evidence available subsequent to the initial hearing' " (*id.* at 19a (brackets in original), quoting *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 459 (5th Cir. 1981)). The court directed the Board to hold the proceedings in abeyance for 60 days to give respondents an opportunity to file a motion to reopen their deportation proceedings (Pet. App. 20a). The court cautioned the Board "to give careful and thorough consideration to the * * * motion to reopen if, indeed, one is filed" (*id.* at 20a n.5).

3. Respondents filed a motion to reopen, accompanied by applications for suspension of deportation. In their motion to reopen, respondents alleged that they had been in the United States for a continuous period of seven years from the time of their entry on May 1, 1974, that they are persons of good moral character, and that deportation would result in extreme hardship to them and their citizen children (J.A. 16-18). With respect to the extreme hardship claim, respondents alleged that their two citizen daughters, then seven and three years of age, would be deprived of their rights to an education in United

States schools and to social assistance if respondents were deported. Specifically, respondents contended that deportation would interrupt the education of their older daughter in United States schools and would require her to attend Mexican schools where classes are conducted in Spanish. Respondents also raised general claims of psychological and economic hardship to themselves arising from "their low skills and educations" and the lower standard of living in Mexico. J.A. 16-17.

Contrary to the requirements of 8 C.F.R. 3.8(a), respondents submitted no affidavits or other evidentiary materials that specifically addressed these allegations of hardship. The only materials attached to the motion to reopen were respondents' applications for suspension of deportation, copies of respondents' income tax returns, a purchase agreement for a house, a letter showing that Mr. Rios-Pineda was employed, a school record relating to respondents' older child, and birth and marriage records (R. 20-41). Apart from their allegations of hardship, respondents pointed to certain language in the court of appeals' decision that allegedly showed that the court had already accepted their extreme hardship claim (J.A. 17-18).[4] Respondents requested the Board to grant them suspension of deportation (J.A. 18).

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[4] The portion of the court of appeals' opinion relied on by respondents stated (Pet. App. 19a):

> Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth.

The BIA denied respondents' motion to reopen (Pet. App. 11a-15a). The Board noted that respondents had submitted no affidavits in support of their extreme hardship claim and concluded that "the documents and vague allegations forwarded by counsel" as part of the motion to reopen were not sufficient to establish a prima facie showing of extreme hardship (*id.* at 13a-14a).

The Board further concluded that the motion to reopen should in any event be denied in the exercise of its discretion (Pet. App. 14a-15a). The BIA observed that respondents were able to acquire seven years' presence and the additional equity of a second child only by pursuing what it considered to be "frivolous appeals," and it concluded that denial of a motion to reopen is appropriate where statutory eligibility for relief is acquired only by means of such dilatory tactics (*id.* at 14a). The BIA also noted that respondents had entered the United States in May 1974 with the assistance of a paid smuggler to help them avoid inspection, that on that occasion Mr. Rios-Pineda was returning within only two months of a forced departure, and that he had been granted administrative voluntary departure yet had failed to depart voluntarily prior to the instant deportation proceeding (*id.* at 14a-15a). Concluding that these adverse factors "evidenced [respondents'] disregard for our immigration laws" and outweighed the equities in respondents' favor, the BIA denied the motion to reopen as a matter of discretion (*id.* at 15a).

4. The court of appeals again reversed and remanded the case to the BIA with directions to reopen the deportation proceedings and hold a hearing to determine respondents' eligibility for suspension of deportation (Pet. App. 1a-10a). The court concluded

that it had implicitly decided in its earlier decision that respondents had made a prima facie case of extreme hardship and that this determination was binding on the Board as the "law of the case" (*id.* at 5a-7a). The court of appeals then reviewed the factors supporting its earlier "holding"[5] and concluded that that holding was not clearly erroneous (*id.* at 7a).

Alternatively, the court of appeals ruled that, even if the court had not decided the issue in its prior opinion, the Board abused its discretion in declining to find that respondents had made a sufficient showing of extreme hardship to warrant reopening of their deportation proceedings. The court pointed out that Mr. Rios-Pineda had claimed his mother, a resident of Mexico, as a dependent on his federal income tax returns and that the Board had never considered the hardship to respondents that deportation might entail with respect to respondents' ability to continue supporting Mr. Rios-Pineda's mother. Furthermore, the court stated that the Board had failed to consider the possibility that respondents' citizen children could speak only English, thus increasing the educational and social hardship if they were forced to go to Mexico with their parents. Pet. App. 7a-8a n.3.[6]

[5] These factors were that Mr. Rios-Pineda had been regularly employed since 1974, that respondents had made a substantial down payment on a home, and that their citizen children had lived in the United States since birth (Pet. App. 7a).

[6] The court of appeals failed to mention that respondents' motion to reopen and applications for suspension of deportation (see J.A. 22, 26) did not refer to respondents' obligation to support Mr. Rios-Pineda's mother (undoubtedly because 8 U.S.C. 1254(a)(1) limits consideration of parental hardship to a parent "who is a citizen of the United States or an alien lawfully admitted for permanent residence") and did not allege that respondents' daughters spoke only English. Moreover, both of these additional factors identified by the court of appeals were almost surely without any factual basis. Mr. Rios-Pineda's mother had been listed as a dependent on his income tax returns at one time, but she was no longer listed as a dependent on the most recent returns, 1979-1981 (see R. 26-28). And it seems most unlikely that respondents' children could not speak Spanish, given that their parents' limited knowledge of English required the deportation hearing to be conducted through an interpreter.

The court of appeals also held that the BIA's discretionary denial of respondents' motion to reopen was based on improper factors (Pet. App. 8a-9a). The court disagreed with the BIA's characterization of respondent's appeals as "frivolous," stating that the court had "twice considered petitions which, regardless of their ultimate success, have required further proceedings to fully and fairly decide the [respondents'] claim of their right to stay in this country" (*id.* at 9a). In addition, the court concluded that the Board's reliance on respondents' "disregard" for the immigration laws, as manifested by their use of a paid smuggler and by Mr. Rios-Pineda's repeated refusal to depart voluntarily, was "arbitrary, irrational, [and] contrary to the law'" (*ibid.* (brackets in original) (quoting *Batoon* v. *INS*, 707 F.2d 399, 401 (9th Cir. 1983)) because "[s]uch 'disregard' is necessarily present in some form in most deportation proceedings" (Pet. App. 9a).

SUMMARY OF ARGUMENT

A. Although the Immigration and Nationality Act of 1952 does not provide a procedure to reopen deportation proceedings on the basis of newly discovered

evidence, the Attorney General has accorded such relief administratively. 8 C.F.R. 3.2. This regulation is intended to prevent injustice in those unusual cases where subsequent developments have rendered unfair a validly entered deportation order. Because this remedy is not mandated by statute, common sense suggests that the agency should have broad discretion in determining whether the circumstances justify reopening deportation proceedings. This Court recently has twice confirmed that view, noting that the Attorney General's discretion to deny such motions includes the right to be restrictive in considering them. *INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 5 n.6; *INS* v. *Wang*, 450 U.S. 139, 144 n.5 (1981).

The Attorney General's discretion to be selective in ruling on motions to reopen is particularly broad where an alien seeks reopening for the purpose of applying for suspension of deportation—relief that is itself discretionary. The suspension remedy is an "exceptional" one that Congress designed to be granted sparingly. See *Phinpathya*, slip op. 5, 7. The Attorney General has considerable latitude in assessing whether an alien has satisfied the eligibility requirements for suspension relief (*Wang*, 450 U.S. at 144), and "unfettered discretion" to grant or deny the relief to applicants who meet the statutory criteria (*Jay* v. *Boyd*, 351 U.S. 345, 354 (1956)).

Thus, when confronted with respondents' motion to reopen their deportation proceedings to allow them to move for suspension of deportation, the Attorney General had to consider whether the new evidence warranted reopening the proceedings, whether the statutory requirements for eligibility for suspension relief had been satisfied, and whether that relief was

likely to be granted. With respect to each of these determinations, the Attorney General's decision was entitled to substantial deference.

B. 1. a. The Board of Immigration Appeals was fully justified in denying respondents' motion to reopen on the ground that they had achieved seven years' "continuous physical presence" in this country, which is a criterion for suspension of deportation, only by filing frivolous appeals that delayed their deportation. There can be no doubt that the appeals were frivolous. Respondents' briefs on appeal to both the BIA and the court of appeals were conclusory and essentially without citation to authority. The briefs raised claims that respondents' counsel almost surely had to know were without legal foundation and, in some instances, without any factual basis.

b. The court of appeals' disagreement with the BIA's characterization of the appeals as "frivolous" appears to be one of semantics. The court did not suggest that the contentions raised on appeal had any substantive merit; it simply noted that they were not "frivolous" because they had resulted in a remand for further proceedings. The availability of that relief, however, was *solely* a function of the delay in deportation occasioned by the meritless appeals. See Pet. App. 9a. Thus, the court of appeals has held that "buying time" is itself a legitimate reason to take an appeal—a view that denigrates and trivializes the appellate process.

c. i. Strong policy considerations justify the BIA's refusal to reopen deportation proceedings in circumstances like these. If aliens were able to qualify for suspension of deportation by abusing the appellate process in order to delay their departure from this country, the "continuous physical presence" require-

ment imposed by Congress would be rendered ineffective as a means of limiting the availability of suspension relief. Moreover, widespread use by aliens of procedural devices unjustifiably to delay their deportation for long periods of time already has created serious problems of administrative burden and disrespect for the law. Reopening respondents' deportation proceedings would establish a precedent that would seriously exacerbate these problems. Therefore, the BIA would have been remiss in its duty if it had granted respondents' motion to reopen.

ii. Even if the BIA's decision were not so clearly correct, the Board certainly cannot be said to have abused its broad discretion in denying respondents' motion to reopen. The court of appeals' opinion does not explain why the BIA's ruling was arbitrary and capricious and shows no appreciation that it was obliged to accord that ruling considerable deference. The court appears to have held that the Board has no discretion to deny a motion to reopen when the basis of the motion is that the alien has satisfied the threshold requirements for suspension of deportation. That holding not only conflicts with decisions of this Court, but also creates practical problems for the administration of the immigration laws.

It is particularly important that the Attorney General be given broad authority to exercise his discretion to grant relief sparingly in the case of motions to reopen. Aliens subject to deportation orders can easily allege some newly discovered evidence, and thus file a facially valid motion to reopen, which in turn can lead to a stay of deportation. Unless the Attorney General is permitted broad discretion to deny such motions for reasons like abuse of the appellate

process, they will be a vehicle for endless delay of deportation.

2. The BIA also was justified in denying relief because of respondents' deliberate disregard for the immigration laws. The court of appeals held that consideration of this factor was "improper and irrelevant" because "[s]uch 'disregard' is necessarily present in some form in most deportation proceedings" (Pet. App. 9a). But there is a considerable difference between an alien who complies with the law, apart from having stayed in the country illegally, and an alien who enters the United States without inspection, deceives the government while in the United States, and abuses the procedural opportunities provided to him by the immigration laws. In determining whether an alien is deserving of discretionary relief, it unquestionably is appropriate for the Attorney General to take that difference into account.

ARGUMENT

THE ATTORNEY GENERAL HAS DISCRETION TO DECLINE TO REOPEN DEPORTATION PROCEEDINGS WHEN THE ALIEN HAS BECOME ELIGIBLE FOR THE REQUESTED UNDERLYING DISCRETIONARY RELIEF ONLY BY FILING FRIVOLOUS APPEALS AND HAS IN OTHER WAYS EXHIBITED DISREGARD FOR THE IMMIGRATION LAWS

In recent years, this Court has repeatedly emphasized that extensive judicial interference with the exercise of discretionary authority accorded the Attorney General under the Immigration and Nationality Act of 1952 conflicts with the intent of Congress and undermines principles of separation of powers. See *INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip

op. 11-12; *INS* v. *Wang*, 450 U.S. 139, 146 (1981).[7] This case presents an extreme example of such interference. Here, the court of appeals has prevented enforcement of lawful administrative orders (issued in 1978) requiring the deportation of aliens who have conceded deportability, by holding that the Board of Immigration Appeals erred in failing to grant discretionary relief designed to deal with the extraordinary situation.

The court of appeals' holding appears to rest on little else than the view that the judges on the panel would have granted respondents' requests for relief had they been the decisionmakers at the agency. Indeed, the court's error is particularly striking in this case because the BIA not only acted well within its discretionary authority, but in fact took the only action sensible in the circumstances. As the undisputed evidence showed, respondents achieved eligibility for the relief sought only by delaying their deportation by filing frivolous appeals.

The decision of the court of appeals thus reflects two fundamental errors inimical to the sound functioning of the immigration laws. It ignores the fact that Congress has delegated to the Executive Branch, rather than to the courts, the primary responsibility for dispensing discretionary relief in the immigration area, and it invites deportable aliens to abuse the immigration system by offering the promise that such abuse may well pay substantial dividends.

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[7] The Attorney General has delegated his authority under the immigration laws to the Commissioner of Immigration and Naturalization, the Board of Immigration Appeals, and other special officers. See 8 C.F.R. 2.1, 3.1.

A. The Attorney General Has Broad Discretion In Considering Whether To Grant A Motion To Reopen Deportation Proceedings For The Purpose Of Considering An Application For Suspension Of Deportation

1. Although Congress generally has specified the procedures for conducting deportation proceedings in Section 242 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1252, the Act does not provide a mechanism by which an alien may reopen deportation proceedings after a final order of deportation has been issued. The Attorney General has provided by regulation, however, that deportation proceedings may be reopened on the basis of new developments. 8 C.F.R. 3.2, 3.8; see *INS* v. *Wang*, 450 U.S. at 140-141. The regulation states that a motion to reopen will not be granted unless the new evidence sought to be introduced is material and was not available and could not have been discovered at the prior hearing; moreover, it provides that a motion to reopen for the purpose of applying for discretionary relief will not be granted "unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing."[8]

The regulation authorizing reopening of deportation proceedings appears to have been intended to permit relief in the unusual case in which subsequent developments have undermined the justification for an outstanding order of deportation and rendered it unfair. Because the procedural avenue of reopening deportation proceedings would not exist but for the action of the Attorney General in creating it by regulation, it stands to reason that the Attorney General

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[8] Under 8 C.F.R. 3.8, the motion to reopen "shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material."

should have considerable discretion in exercising his authority to determine whether the circumstances warrant granting the remedy. See *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 158 n.13 (1982); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). See also *Shin* v. *INS*, No. 84-1097 (D.C. Cir. Dec. 14, 1984), slip op. 7 (Starr, J., dissenting).

This Court has expressly recognized the broad discretion of the Attorney General and his delegates in considering a motion to reopen deportation proceedings. In *INS* v. *Wang*, 450 U.S. at 143-144 n.5, the Court stated:

> The present regulation is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulation may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened.

The Court went on to note with approval the dissent in the lower court in a companion case to *Wang*, which explained the importance of affording the Attorney General discretion to be selective in granting a limited number of motions to reopen:

> "If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations."

Ibid. (quoting *Villena* v. *INS*, 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc) (Wallace, J., dissenting)).

The Court recently addressed the BIA's discretionary authority with respect to motions to reopen in a situation closely analogous to the present case. In *INS* v. *Phinpathya*, *supra*, the issue before the Court was whether an alien seeking suspension of deportation had met the seven years' continuous presence requirement despite a three month trip abroad during the seven year period. In this Court, the alien argued that the case was moot because by that time she had completed seven years' continuous presence in the United States since her return from the trip in question. The Court rejected the mootness argument, finding that the alien had not established that she would now be eligible for suspension of deportation because, although she had filed a motion to reopen the deportation proceedings, "granting of the motion is entirely within BIA's discretion." Slip op. 5 n.6. Thus, *Phinpathya* confirms the Court's statement in *Wang* that the BIA may exercise its discretion to deny a motion to reopen "beyond requiring proof of a prima facie case." 450 U.S. at 144 n.5.

2. The principle that the BIA has "the right to be restrictive" in reopening deportation proceedings is particularly apt in a situation like the one presented here, where the purpose of reopening the proceeding is solely to allow the alien to petition for suspension of deportation—relief that is itself discretionary. In such a situation, it is clear that the alien must show more than statutory eligibility for the relief. He

must also show that "a grant of relief may be warranted as a matter of discretion." *Marcello* v. *INS*, 694 F.2d 1033, 1035 (5th Cir.), cert. denied, 462 U.S. 1132 (1983).[9]

In the case of suspension of deportation, Congress has insisted that an alien satisfy "strict threshold criteria" (*INS* v. *Phinpathya*, slip op. 11). In order to be eligible for suspension relief, an alien must have been physically present in the United States for seven continuous years, must have been a person of good moral character during that time, and must be able to show that his deportation would cause "extreme hardship" to himself or to his spouse, parent, or child who is a United States citizen or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1).[10]

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[9] The *Marcello* court addressed this point in detail (694 F.2d at 1035 (citation omitted)):

> A motion to reopen, entitling the applicant to present new evidence (and involving further delay in the enforcement of a deportation order), is not available upon a bare showing of statutory eligibility. Rather, to be entitled to a reopening and further hearing, the alien must first make a prima facie showing that there is a reasonable likelihood that the relief sought would be granted at the reopened hearing. The prima facie showing includes not only that there is a reasonable likelihood that the statutory requirements for the relief sought are satisfied, but also a reasonable likelihood that a grant of relief may be warranted as a matter of discretion.

[10] The suspension of deportation remedy was first added to the immigration laws in 1940 (ch. 439, § 20, 54 Stat. 672). In 1952, a new and more restrictive provision was enacted because of what Congress perceived as abuse of the suspension remedy that was "grossly unfair to aliens who await their turn on the quota waiting lists." S. Rep. 1137, 82d Cong., 2d Sess. 25 (1952). The 1952 amendment made the suspension remedy available only upon a showing of "exceptional and extremely unusual hardship" (ch. 477, § 244, 66 Stat. 214). The provision was amended again in 1962 to substitute the present requirement of "extreme hardship" (Pub. L. No. 87-885, § 4, 76 Stat. 1248).

The Attorney General has the authority to construe "'extreme hardship' narrowly" in considering suspension applications. *INS* v. *Wang*, 450 U.S. at 145. These threshold requirements reflect what this Court has recognized as the "exceptional nature of the suspension remedy." *Ibid.* See also *INS* v. *Phinpathya*, slip op. 5, 7, 10 n.11.

Moreover, suspension relief is not available to every alien who satisfies the eligibility requirements. By its terms, the statute confers upon the Attorney General the power to determine "*in his discretion*" which eligible applicants should receive this extraordinary relief. As the Court said in *Jay* v. *Boyd*, 351 U.S. 345, 353 (1956), "Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of the Attorney General." See also *INS* v. *Wang*, 450 U.S. at 144. The Attorney General's discretion in this regard is "unfettered." *Jay* v. *Boyd*, 351 U.S. at 354. See also *Foti* v. *INS*, 375 U.S. 217, 228 (1963); *Ramos* v. *INS*, 695 F.2d 181, 184-185 (5th Cir. 1983). Indeed, if the Attorney General decides that the relief should be denied as a matter of discretion it is unnecessary for him even to consider whether the threshold statutory eligibility requirements are met. *INS* v. *Bagamasbad*, 429 U.S. 24 (1976).

Even after the Attorney General has determined to exercise his discretion in favor of granting suspension of deportation, the alien is not assured of obtaining the relief. Under the statute, each administrative order of suspension must be reported to Congress and

is subject to legislative veto there. 8 U.S.C. 1254(c).[11] This requirement of congressional review of each individual case, along with the fact that each suspension of deportation that is ultimately granted results in a corresponding reduction in the number of nonpreference immigrant visas authorized to be issued during that fiscal year (8 U.S.C. 1254(d)), plainly indicates that the remedy of suspension was designed to be issued sparingly. Thus, while Congress created the remedy of suspension of deportation, the statute reveals that it "was interested in limiting grants of this relief to a minimum." *Jay* v. *Boyd*, 351 U.S. at 356.

In sum, when an alien files a motion to reopen deportation proceedings in order to apply for suspension of deportation, the Attorney General is invested with extremely broad discretion in acting on the motion because of his discretionary authority with respect to both the procedure itself and the ultimate relief being sought. Because of the administrative burden engendered by the granting of such a motion (see *Wang*, 450 U.S. at 144 n.5; *Marcello* v. *INS*, 694 F.2d at 1035) and the exceptional nature of the suspension remedy, it is important that the Attorney General be exceedingly selective in granting such motions.

B. The BIA Did Not Abuse Its Discretion In Declining To Reopen Respondents' Deportation Proceedings

Against this background, it cannot seriously be contended that the BIA abused its discretion in declining

[11] The legislative veto provision was declared unconstitutional in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983). Suspension determinations nonetheless remain subject to a "report and wait" requirement. Slip op. 14 & n.9.

to grant respondents' motion to reopen their deportation proceedings in order to apply for suspension of deportation. The Board found that respondents had achieved the statutory eligibility requirement of seven years' continuous presence only by filing frivolous appeals. The Board also found that Mr. Rios-Pineda had repeatedly exhibited disregard for the immigration laws, including failing to leave the country after requesting the privilege of voluntary departure. Given this history of abuse of the immigration system—both by misusing for the sole purpose of delay the appellate process that is designed to guarantee fair decisionmaking and by deceiving the immigration authorities to avoid departure—the BIA would have been remiss in its duty to exercise its discretion selectively and intelligently had it elected to reopen respondents' deportation proceedings.

1. *The BIA's Decision Not To Reopen The Deportation Proceedings Was Justified By The Fact That Respondents Had Qualified For Suspension Of Deportation Only By Filing Frivolous Appeals*

a. *Respondents' Appeals Were Frivolous.* There can be no doubt that the appeal filed by respondents from the immigration judge's original deportation order was frivolous and served no purpose other than to delay respondents' deportation until they could satisfy the seven year "continuous physical presence" requirement.[12] Respondents raised four separate contentions in their brief on appeal to the BIA (J.A. 36-37). Each of these contentions was conclusory and completely without citation to authority, and respondents'

[12] The filing of this appeal stayed respondents' deportation while the case was pending before the BIA. 8 C.F.R. 3.6(a).

counsel could have had no reasonable expectation that they were entitled to prevail on any of them.

Respondents' primary contention was that their deportation would result in an unconstitutional de facto deportation of their citizen child (J.A. 36-37). At the deportation hearing, however, the immigration judge had informed respondents' counsel that this argument was contrary to established law, and, moreover, that the one case that counsel cited in support, *Acosta* v. *Gaffney*, 413 F. Supp. 827, 831-833 (D.N.J. 1976), rev'd, 558 F.2d 1153 (3d Cir. 1977), had been reversed on appeal (R. 100-101). Thus, respondents were aware that this argument was foreclosed by prior precedent, as the BIA subsequently found (Pet. App. 22a-23a);[13] they dealt with this problem simply by failing to cite any authority.

Respondents also raised on appeal the contention that they should have been entitled to relief under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), based on their alleged seven years of residency in this country and because they "never committed any illegal or anti-social activity" (J.A. 37). This contention was totally without factual basis because neither respondent had been "lawfully admitted for permanent residence"—a prerequisite to Section 212(c) relief. See Pet. App. 23a. In any event, the immigration judge had already found that Mr. Rios-Pineda had not been in the United

[13] At the time of respondents' appeal, their argument had been rejected by at least six different circuits, including the Eighth Circuit. See *Mamanee* v. *INS*, 566 F.2d 1103, 1105-1106 (9th Cir. 1977); *Acosta* v. *Gaffney*, 558 F.2d at 1157; *Gonzalez-Cuevas* v. *INS*, 515 F.2d 1222, 1224 (5th Cir. 1975); *Cervantes* v. *INS*, 510 F.2d 89, 91-92 (10th Cir. 1975); *Enciso-Cardozo* v. *INS*, 504 F.2d 1252, 1253 (2d Cir. 1974); *Mendez* v. *Major*, 340 F.2d 128, 131 (8th Cir. 1965).

States for seven years, and respondent made no attempt to explain why this mathematical determination was incorrect.[14]

In addition, respondents argued briefly that the order to show cause had been issued "extemporaneously" and should be invalidated because Mr. Rios-Pineda had an application for labor certification pending at the time. As the BIA subsequently held (Pet. App. 23a), this contention was wholly without merit because neither the immigration judge nor the Board has jurisdiction to review the District Director's decision to institute deportation proceedings. *Lopez-Telles* v. *INS*, 564 F.2d 1302, 1304 (9th Cir. 1977). See 8 C.F.R. 103.1(n), 242.1(a). In any case, a pending application for labor certification does not entitle an illegal alien to escape deportation. See *Bowes* v. *District Director*, 443 F.2d 30 (9th Cir. 1971).

Finally, respondents' claim that their Fifth Amendment privilege against self-incrimination was violated at the deportation hearing was fanciful on its face.[15] Respondents did not even allege that they had been coerced in any way to give any responses to the immigration judge, and, indeed, their attorney had waived the requirement that the immigration judge explain respondents' rights to them (Pet. App. 24a; R. 84).[16] Moreover, respondents did not explain how

[14] Thus, even if respondents had intended in their appeal to seek suspension of deportation, rather than Section 212(c) relief, the contention was frivolous because the seven year requirement plainly was not satisfied.

[15] Deportation proceedings are civil, not criminal (see *INS* v. *Lopez-Mendoza*, No. 83-491 (July 5, 1984), slip op. 5), so it is clear that respondents had no Fifth Amendment right not to be questioned at the hearing.

[16] INS regulations instruct the judge to notify the alien at the beginning of the deportation proceeding of his rights,

their own testimony had incriminated them; in fact, before respondents answered any questions after they were sworn, their counsel already had admitted the allegations in the show cause order and conceded deportability on their behalf (Pet. App. 24a; R. 84-86).

After the BIA dismissed respondents' appeal (see note 3, *supra*), they pursued several of these contentions in a petition for review to the Eighth Circuit (J.A. 31-33).[17] In their brief in the court of appeals, respondents raised three claims: (1) that the "evidence" against them was tainted because they had not been given *Miranda* warnings; (2) that their deportation was an unconstitutional deportation of their children; and (3) that Mr. Rios-Pineda had been present in the country for seven years and hence was entitled to suspension of deportation (J.A. 28-29). This appeal was, if possible, even more frivolous than the prior administrative appeal because respondents now had the benefit of the BIA's point-by-point refutation of their contentions, yet they made no effort to show why the BIA had erred. Thus, respondents again failed to explain how there could be a Fifth Amendment or *Miranda* violation when their attorney had specifically waived the opportunity for them to be informed of their rights by the judge, and, in any case, when their attorney had conceded deportability on their behalf. By the same token, respondents' argument that their children were being subjected to unconstitutional de facto deportation (see J.A. 29) rested on two cases rejecting that position and on a district

inter alia, to counsel, to present evidence and object to the evidence against him, and to cross-examine witnesses. The alien may waive his right to this explanation. 8 C.F.R. 242.16.

[17] The filing of this petition entitled respondents to an automatic stay of deportation. 8 U.S.C. 1105a(a)(3).

court decision that both the BIA (Pet. App. 23a) and the immigration judge (R. 100-101) had identified as having been reversed on appeal. Nor could respondents point to any error in the findings below that they had not met the seven year requirement for suspension of deportation (a claim that respondents did not even raise in the BIA).[18]

b. *The Court Of Appeals Asserted No Justification For Respondents' Appeals Other Than To Delay Deportation Long Enough For Them To Qualify For Suspension Relief.* Notwithstanding the nature of the contentions raised by respondents in these appeals, the court of appeals held that they "do not fall into the 'frivolous' category" (Pet. App. 9a). In reaching this conclusion, however, the court of appeals curiously did not address the merit of any of the conten-

[18] By the time respondents' brief in the court of appeals was due, more than seven years had elapsed since Mr. Rios-Pineda had first entered the country, although Mrs. Rios-Pineda still could make no possible claim of seven years' presence. Even Mr. Rios-Pineda, however, did not have seven years' *continuous* presence in the country because he had left the United States for two months in 1974 under threat of deportation. While at the time of the hearing, prior to this Court's decision in *INS* v. *Phinpathya*, the administrative practice was that some minor absences were not considered to break the continuous presence period, it was never the case that a departure under threat of deportation and subsequent illegal entry was not considered a meaningful interruption of the period. The immigration judge had informed respondents and their counsel both at the deportation hearing (R. 90) and in his written decision (Pet. App. 27a) that the law was clear that such an absence was a legal interruption of the period of continuous presence. See *Heitland* v. *INS*, 551 F.2d 495, 503-504 (2d Cir.), cert. denied, 434 U.S. 819 (1977); *Segura-Viachi* v. *INS*, 538 F.2d 91, 92 (5th Cir. 1976); *Barragan-Sanchez* v. *Rosenberg*, 471 F.2d 758, 760 (9th Cir. 1972).

tions raised by respondents on appeal. Rather, the court simply noted that the petitions for review, "regardless of their ultimate success, have required further proceedings to fully and fairly decide [respondents'] claim of their right to stay in this country" (*ibid.*). This is technically true, of course, but the "further proceedings" ordered by the court resulted *solely* from the fact that respondents were able to delay their deportation long enough—by filing meritless appeals—to meet the eligibility requirements for suspension of deportation. The court of appeals' first decision to remand the case to the Board was based exclusively on respondents' satisfaction of the seven year presence requirement during the pendency of the appeal; the remand was not attributable to a single one of the substantive contentions raised by respondents.

The import of the court of appeals' finding here is quite astonishing: any litigation that buys sufficient time to accrue seven years' physical presence cannot be considered "frivolous"; delay is thus recognized as a legitimate end in itself. While that finding represents an unfortunate attitude toward the appellate process, it does not indicate any factual disagreement between the court of appeals and the Board on the nature of respondents' appeals. Rather, the difference between the characterization of respondents' appeals by the court and by the BIA seems to be one of semantics. To the Eighth Circuit, an appeal cannot be classified as "frivolous" if it was effective in achieving delay that improved the alien's legal position, even if it is undisputed that the appeal was totally devoid of substantive merit.

c. *The BIA Acted Well Within Its Authority In Denying The Motion To Reopen Because Of Respondents' Frivolous Appeals.* The court of appeals' holding that, in circumstances like those presented here, the BIA lacks discretion to refuse to reopen deportation proceedings for the purpose of permitting an alien to apply for suspension of deportation cannot be countenanced. Enforcement of the immigration laws is already plagued by extensive deportation delays caused by the manipulation of procedural devices by deportable aliens. It would have been irrational for the Board to reward respondents' abuse of the appellate process by reopening their deportation proceedings—a precedent that would give added incentive to aliens to misuse the appellate process for purposes of delay.

Perhaps more important, even if there were some argument for permitting reopening here, the Board surely cannot be said to have abused its discretion in failing to reopen. The court of appeals committed serious error by failing to accord any genuine deference to the Board's exercise of its discretion. That error is particularly grievous in the context of a motion to reopen deportation proceedings, because it is so easy for an alien to accrue "new evidence" that will support a facially valid motion to reopen. The sheer number of such motions and their potential as vehicles for endless delay make it imperative that the Board have broad discretion to be selective in granting motions to reopen.[19]

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[19] Motions to reopen are not limited to cases involving applications for suspension of deportation; rather, a motion to reopen may be filed in virtually every deportation case. The Executive Office of Immigration Review in the Department of Justice advises us that approximately 3,000 motions to reopen

i. Strong policy considerations militate against giving an alien the opportunity to apply for suspension of deportation when he has met the seven years' "continuous physical presence" requirement only by delaying his deportation through the filing of plainly unmeritorious appeals. For many illegal aliens, suspension of deportation is the only avenue through which they can hope to remain in this country once their illegal presence is detected and the government has moved to deport them. Prior to this case, the seven year presence requirement might have been viewed as an insurmountable barrier for many aliens. But the decision below suggests that this requirement, which Congress contemplated as a substantial limitation on the availability of suspension relief (see *INS* v. *Phinpathya, supra*), can be rendered almost meaningless by dilatory tactics. It is now more than six years since respondents were ordered deported; this indicates that even if respondents had been apprehended by the INS immediately after they had illegally entered this country, they still could have achieved the seven year requirement by filing unmeritorious motions and frivolous appeals.

As the reported cases reflect, there are already too many incentives and opportunities for illegal aliens to take advantage of immigration provisions intended to mitigate true hardship, in an effort to

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were considered by immigration judges during the year ending in April 1984. During 1983, the BIA adjudicated approximately 450 motions to reopen deportation proceedings. (A motion to reopen is addressed to the immigration judge if the outstanding order of deportation has not been appealed. 8 C.F.R. 103.5, 242.22. However, where, as here, the order of deportation has been upheld by the Board, the Board retains jurisdiction to rule on the motion. 8 C.F.R. 3.2, 3.8).

frustrate deportation and to prolong substantially their illegal stay in this country. See, *e.g.*, *Oum* v. *INS*, 613 F.2d 51, 52-54 (4th Cir. 1980); *Hibbert* v. *INS*, 554 F.2d 17, 19-21 (2d Cir. 1977); *Schieber* v. *INS*, 520 F.2d 44 (D.C. Cir. 1975). Many aliens have a double incentive for dilatory tactics—delay for its own sake to prolong an unlawful stay in this country, and delay designed to improve a legal position by accruing sufficient time to meet the eligibility requirements for suspension or other relief. Plainly, rewarding such delay by requiring the Attorney General to reopen deportation proceedings in a case like this one can only further encourage deportable aliens to file frivolous motions and appeals.[20]

The facts of this case itself graphically illustrate that, for many illegal aliens, delay alone has become the basic legal strategy. From the time that Mr. Rios-Pineda was apprehended, respondents have concentrated on using every means at their disposal to postpone their departure from this country until they could accrue seven years' continuous presence. First, Mr. Rios-Pineda agreed to depart voluntarily and obtained at least two extensions of time to depart. When told that he would not receive any further extensions, Mr. Rios-Pineda simply refused to leave by

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[20] Accordingly, with the exception of the court below, the lower courts have upheld the Attorney General's discretionary authority to deny motions to reopen because of the alien's abuse of the appellate process in order to delay deportation. See *LeBlanc* v. *INS*, 715 F.2d 685, 693 (1st Cir. 1983); *Agustin* v. *INS*, 700 F.2d 564, 566 (9th Cir. 1983); *Balani* v. *INS*, 669 F.2d 1157, 1160-1162 (6th Cir. 1982); *Der-Rong Chour* v. *INS*, 578 F.2d 464, 467-468 (2d Cir. 1978), cert. denied, 440 U.S. 980 (1979); *Schieber* v. *INS*, 520 F.2d at 52-53; *Lam Chuen Ching* v. *INS*, 467 F.2d 644, 645 (3d Cir. 1972).

the appointed day, thereby requiring the INS to institute deportation proceedings. See Pet. App. 28a; R. 97-98. The stage then shifted to the December 1978 hearing where, after conceding deportability, respondents' counsel asked that the deportation order be stayed until respondents would become eligible for suspension of deportation (J.A. 38)—*a period of two and one half more years.* When it became apparent that the immigration judge would not grant such a stay, respondents' attention turned to the appellate process. Indeed, respondents' counsel first announced his intention to appeal even before the immigration judge rendered his decision (see R. 94-95).

Generally recognized principles of equity strongly indicate that it would have been inappropriate to grant respondents suspension relief in these circumstances. For example, when a party receives additional monies because of the existence of an injunction that is later overturned, it ordinarily is required to make restitution of those monies. *Arkadelphia Milling Co.* v. *St. Louis S.W. Ry.*, 249 U.S. 134, 145-146 (1919). See *Ex parte Lincoln Gas & Electric Light Co.*, 256 U.S. 512, 518 (1921); cf. also *United States* v. *Tateo*, 377 U.S. 463, 468 (1964) (defendant should not reap benefit because of delay in requesting relief). The same principle applies when the benefit obtained is not simply money, but rather the satisfaction of some prerequisite to relief or recovery that depends on the passage of time. Thus, when a military officer achieves sufficient service time to qualify for a benefit only because he obtained an injunction that was later determined to be erroneous, the courts have held that he is not entitled to the benefit. See *Cass* v. *United States*, 483 F.2d 220, 222 (9th Cir. 1973), aff'd, 417 U.S. 72 (1974); *Pauls* v. *Seamans*, 468 F.2d 361, 363 (1st Cir. 1972). The same rule should govern here, where respondents were able to meet the seven year requirement not because of an injunction but because of the automatic stays of deportation brought about by their appeals.[21] In short, we think it clear that the BIA acted wisely in denying respondents' motion to reopen.

ii. Even if the wisdom of the BIA's decision were debatable, however, the court of appeals erred in failing to accord it considerable deference. The court's opinion shows no recognition of the BIA's broad discretion in ruling on motions to reopen. While the decision pays lip service to the "abuse of discretion" standard, the court nowhere suggests why the BIA's decision " 'was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group.' " *LeBlanc* v. *INS*, 715 F.2d 685, 693 (1st Cir. 1983) (quoting *Balani* v. *INS*, 669 F.2d 1157, 1160 (6th Cir. 1982)). As a practical matter, the court approached the question as though the Board had no discretion at all and its decisions whether to grant reopening were subject to de novo review.[22]

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[21] The BIA in fact has taken a more lenient approach than these cases would allow and has been willing to consider reopening for application for suspension of deportation in some cases where the seven year presence requirement was not met until after appeal. However, this is surely not a case warranting such consideration. The appeals here were not merely erroneous; they were correctly found by the BIA to be "frivolous." When the appellate process is misused simply to "buy time," it is plainly unreasonable to allow an alien to profit from the delay.

[22] The court of appeals' failure to respect the Board's discretion is even more blatantly evidenced in another aspect of

As noted above (pages 17-22, *supra*), the Board's broad discretion in this area has been repeatedly recognized by decisions of this Court. In addition, there are weighty practical reasons why discretionary remedies such as granting motions to reopen and suspension of deportation must be left in the first instance to the Attorney General with only limited review by the courts. These reasons were well summarized by Judge Sneed in his dissent in *Wang* v. *INS*, 622 F.2d 1341, 1351 (9th Cir. 1980) (en banc), rev'd, 450 U.S. 139 (1981):

> The judicial process is quite unsuited to deal dispositively with the many issues arising from our immigration statutes and policies. Its nature limits our vision to the alien before us and conceals from us the problems of the multitudes of aliens, both within and without the Nation, who wish to reside legally within the United States. What in the judicial process may appear to be just may in fact be gross preferential treatment when viewed in its total setting. Only the administrative process can provide the overview of all relevant facts and policies upon which proper justice must rest.

The relief of reopening deportation proceedings can be granted only sparingly; it imposes a substantial

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its decision. As we noted in our petition (at 14-15 n.12), the court's conclusion (Pet. App. 5a-7a) that it had already resolved the extreme hardship issue on the first appeal reflects a total disregard of the Attorney General's primary role in this area, because the Attorney General plainly had not yet made any finding on the extreme hardship issue. Thus, the court's purported ruling on the first appeal could only have been on a de novo basis; the court obviously could not defer to agency discretion that had not yet been exercised.

burden on immigration judges and the BIA to hold new hearings and review the merits of numerous requests for discretionary relief in cases where deportation proceedings apparently have been completed. The court of appeals erred in substantially restricting—if not eliminating [23]—the Attorney General's discretion to choose the most meritorious of the many motions to reopen that are filed.

The flexible nature of the motion to reopen procedure invites a burdensome flood of such motions, which makes it particularly important that the Attorney General have wide discretion to be selective in granting that relief. It is extremely easy for any deportable alien to file a motion to reopen that on its face meets the requirements of the regulation. A motion to reopen may be filed to challenge the basis for the deportation order itself or to give the alien the opportunity to raise any of a number of claims for discretionary relief. And the relevant regulation, which places no limit on the number of motions to reopen that may be filed, is expansively worded in order to give the Attorney General broad authority to grant relief whenever it is warranted. Any new evidence that is material and previously unavailable can support a motion to reopen.[24]

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[23] To the extent the court has held that the BIA *must* reopen deportation proceedings when the grounds for the motion are that the alien has just met the seven year requirement for suspension relief, its decision is flatly inconsistent with this Court's decision in *Phinpathya*. If an alien were entitled to reopening in such a case, Phinpathya would also have been so entitled and, as she argued, her case in the Supreme Court would have been moot. This Court, however, explicitly rejected that contention. Slip op. 5 n.6.

[24] Numerous cases illustrate how easy it can be to meet or manipulate this "new evidence" requirement. See, *e.g.*, *Car-*

If the Board is allowed wide discretion to be selective in considering motions to reopen, it can control the potential administrative burden they create and the courts of appeals can expeditiously dispose of most petitions for review filed in connection with such motions. If, on the other hand, the Board's decision on these motions is reviewed by the courts under something approaching a de novo standard, as was the case below, it will lead to "endless delay of deportation by aliens creative • • • enough to continuously produce new and material facts." *INS* v. *Wang*, 450 U.S. at 144 n.5 (quoting *Villena* v. *INS*, 622 F.2d at 1362 (Wallace, J., dissenting)).

2. The BIA's Decision Not To Reopen The Deportation Proceedings Was Justified By Respondents' Repeated Flouting Of The Immigration Laws

In denying the motion to reopen, the BIA also relied on respondents' repeated disregard for the Nation's immigration laws, evidenced by their use of a paid smuggler to enter the country and by Mr. Rios-

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rete-Michel v. *INS*, 749 F.2d 490 (8th Cir. 1984) (children "adapting well to life in the United States"; deterioration of economic conditions in Mexico); *Chae Kim Ro* v. *INS*, 670 F.2d 114 (9th Cir. 1982) (citizen child born two years earlier, only two days after appeal taken to BIA); *Sida* v. *INS*, 665 F.2d 851 (9th Cir. 1981) (doctor's letter re tonsillitis susceptibility); *Ravancho* v. *INS*, 658 F.2d 169 (3d Cir. 1981) (new psychiatric evaluation).

The passage of time alone can transform existing conditions into new grounds on which to base a motion to reopen. At the deportation hearing in this case, for example, respondents sought to have their deportation delayed because Mrs. Rios-Pineda was expecting a child (R. 104, 107). Now the court of appeals has found the existence of extreme hardship because, inter alia, that child (now almost six years old) "may only speak English" (Pet. App. 7a n.3).

Pineda's abuse of the privilege of voluntary departure granted to him (Pet. App. 15a). The court of appeals found that reliance on this factor was "arbitrary and irrational" because all deportable aliens have exhibited disregard for the immigration laws (*id.* at 9a). But this fact does not mean that the BIA in exercising its discretion may not differentiate among aliens on the basis of the degree to which they have flouted the immigration process. There is a difference between an alien who is present in the country illegally but otherwise complies with the law and an alien who enters the United States without inspection, deceives the government while in the United States, and abuses the privileges conferred upon him by the immigration system. The Attorney General certainly ought to be able to recognize that difference in exercising his discretionary authority to grant reopening or suspension of deportation. See, *e.g.*, *Moore* v. *INS*, 715 F.2d 13, 15 (1st Cir. 1983); *Ramirez-Gonzalez* v. *INS*, 695 F.2d 1208, 1212 (9th Cir. 1983); *Men Keng Chang* v. *Jiugni*, 669 F.2d 275, 278 (5th Cir. 1982); *Pang Kiu Fung* v. *INS*, 663 F.2d 417, 419 (2d Cir. 1981). Just as a fugitive from justice is not entitled to pursue relief through the courts, an illegal alien who remains in this country by evading valid orders to depart should not be entitled to discretionary administrative relief from deportation. See *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975); *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970).

The same practical factors discussed above that make it appropriate to consider abuse of the appellate process in ruling on motions to reopen make it appropriate to consider flouting of the immigration laws. Because the Attorney General must be selective

in acting on such motions, it is reasonable for him to deny reopening to individuals who repeatedly have exhibited a disregard for the legal process, which casts doubt on their desirability as residents of the United States. Moreover, a contrary rule would encourage aliens found deportable to deceive the INS by requesting voluntary departure even if they have no intention of leaving, since that deceit could not be held against them if they later seek discretionary relief.[25] Thus, an alien would be able to remain at large for a substantial period simply by failing to depart voluntarily; the elapsed time until his apprehension and deportation could be spent accruing some new basis for seeking discretionary relief. See, *e.g.*, *Shin* v. *INS*, No. 84-1097 (D.C. Cir. Dec. 14, 1984) (alien failed to depart when visa expired in 1973, failed to depart voluntarily in 1976, failed to appear for deportation in 1979, sought relief on the basis of 1980 marriage to permanent resident); *Luna* v. *INS*, 709 F.2d 126 (1st Cir. 1983) (citizen child born after failure to depart voluntarily); *Sida* v. *INS*, 665 F.2d 851 (9th Cir. 1981) (second motion to reopen filed on basis of new medical evidence after twice failing to depart voluntarily).

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[25] Obviously, any rule that further increases the likelihood that aliens will evade their responsibilities under the immigration laws—by allowing them to reap substantial benefits from such misconduct—has the general effect of weakening the immigration system. It should be noted, however, that the rule established by the court of appeals also can be expected to result in restrictions on the privileges available to those aliens who do not abuse the legal process. Immigration judges predictably will become reluctant to grant the privilege of voluntary departure, even to aliens who ultimately would abide by their promise to depart, if aliens to whom the privilege is granted deceitfully use it as a means to extend their illegal stay.

Such machinations should not be tolerated. If the Attorney General may weigh against an alien the fact that he abused the legal process by filing frivolous appeals, it seems a fortiori that the Attorney General should be permitted to weigh against an alien the fact that he disregarded the legal process. The court of appeals' holding that such evidence may never be considered is a totally irrational and unacceptable restriction on the Attorney General's discretion and an affront to our immigration system.

In sum, the decision of the court of appeals is an extreme example of judicial usurpation of the Attorney General's discretionary authority of the sort recently condemned by this Court. *INS* v. *Phinpathya*, slip op. 12. Perhaps because of a thinly-veiled dissatisfaction with the existing immigration laws (see Pet. App. 2a, 10a), the court has exercised its authority in a way that will add substantially to the difficulty of deporting aliens illegally in the United States and that will impose a crushing administrative burden on the INS. If the decision below is affirmed, the motion to reopen will be converted from a procedure designed to prevent injustice in extraordinary cases into a loophole that permits "endless delay of deportation." *Wang*, 450 U.S. at 144 n.5 (citation omitted). That result can only further encourage disregard for our Nation's immigration laws and is "grossly unfair to aliens who await their turn on the quota waiting lists." S. Rep. 1137, 82d Cong., 2d Sess. 25 (1952). See also *Wang*, 450 U.S. at 145.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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